



"Two Paths, One Result": A (Heavily Qualified) Defense of Consensus Constitutionalism

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Response

“Two Paths, One Result”: A (Heavily Qualified) Defense of Consensus Constitutionalism

Mark Tushnet^{*}

I. Introduction

Justin Driver’s *The Consensus Constitution*¹ is an important critique of a line of argument that has become prominent in scholarship concerning constitutional history and theory. Professor Driver notes that several authors—most prominently Michael Klarman and Barry Friedman—have elaborated on an older argument associated with Robert Dahl.² They treat the Supreme Court as generally inscribing into constitutional law the views of an undifferentiated American people, the consensus to which Professor Driver’s title refers.³ He points out that American historians have heard about consensus before, and they were rightly skeptical.⁴ He suggests a similar skepticism should be brought to our reading of those who offer a

^{*} William Nelson Cromwell Professor of Law, Harvard Law School. The title of this Response is a play on the relation the People’s Republic of China claims to have to Hong Kong (and, ultimately, to Taiwan), “One Country, Two Systems.” Agnes J. Bundy, *The Reunification of China with Hong Kong and Its Implications for Taiwan: An Analysis of the “One Country, Two Systems” Model*, 19 CAL. W. INT’L L.J. 271, 276–77, 282 (1989).

1. Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755 (2011).

2. See *id.* at 774 & n.121 (indicating that consensus constitutionalists, such as Barry Friedman, invoke political scientist Robert Dahl’s classic work about the Supreme Court (citing Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957))).

3. See *id.* at 757 (defining “consensus constitutionalism” as “the claim that the Supreme Court interprets the Constitution in a manner that reflects the ‘consensus’ views of the American public”).

4. See *id.* at 761–64 (detailing John Higham’s criticism of consensus-based history as glossing over historical diversity and conflict). Driver also points out that the consensus constitutionalists depart from Dahl, who carefully confined his claim to the relationship between Supreme Court decisions and the views of the nation’s political elites, not the views of the American people taken as a whole. *Id.* at 774.

“consensus Constitution.”⁵ In doing so, Professor Driver argues and restores some of the normative leverage on contemporary constitutional issues that consensus constitutionalists seem to abandon.

As Professor Driver shows, some of the historians’ skepticism about “consensus history” was unwarranted because there was less to the consensus school than they thought.⁶ Richard Hofstadter, an important figure in Professor Driver’s narrative of consensus history, thought that his critics had misread him, or at least had not offered the most generous reading of his work that was available to them.⁷

I think that something similar could be said of Professor Driver’s criticism of the consensus constitutionalists. No doubt, they use the term *consensus* quite extensively,⁸ and Professor Driver’s reading is supportable from the texts that he is analyzing. Yet, I think, there is a more generous reading of their work that is available and more defensible because it allows for what Professor Driver and I agree is essential for descriptive accuracy. What is needed is some understanding that constitutional controversy has been a recurrent, even pervasive, characteristic of our constitutional discourse.⁹ After outlining that alternative reading in Part II, I examine its implications for normative constitutional discourse in Part III. Seeing the Constitution as always contested—both before and after seemingly authoritative resolutions by the Supreme Court—gives those who are interested in normative discourse a reason to think that such discourse is not (always) futile.¹⁰

II. The Constitution as Political Process

As Professor Driver’s quotations amply show, Klarman and Friedman do refer more than occasionally to a consensus among the American people

5. *See id.* at 757 (arguing that consensus constitutionalism “paint[s] American legal history with a disfiguringly broad brush, obscuring the deep divisions that typify public response to constitutional questions” and results in scholarship that makes for “bad history” and “worse law”).

6. *See id.* at 766 (indicating that the debate regarding consensus-based history and conflict-based history focused more upon whether the charge of consensus was warranted than which framework was superior).

7. *See id.* at 764–65 & n.60 (remarking that Hofstadter did not wish to be classified as a consensus historian).

8. *See id.* at 769 (“Unlike consensus historians writing during the 1950s, who did not generally invoke the term *consensus* in describing American unity, consensus constitutionalists repeatedly avail themselves of that term—and of the undergirding ideology.”).

9. *See id.* at 801 (“[T]he meaning of the Constitution usually emerges not from consensus but from contestation—an ideological conflict that has occurred throughout American history regarding what the nation’s foundational document permits and requires.”).

10. I should note here that I personally am not all that interested in normative constitutional discourse, at least in my scholarly capacity, because I doubt that I am well-positioned to have any practical effect on outcomes and, therefore, I think that my scholarly energies should be directed elsewhere. I am skeptical as well about the ability of any legal academic to have practical effects of the relevant sort, but I have no interest in dictating to others what scholarly projects to pursue.

on various propositions about the Constitution.¹¹ This consensus, they suggest, explains many Supreme Court decisions: The decisions reflect the consensus.¹² And, importantly for a normative argument associated with their approach, they suggest that Court decisions inconsistent with an assumed consensus are likely to have consequences that advocates of robust judicial review might overlook. A decision inconsistent with the consensus might be widely ignored, for example, or the Court's reputation and, therefore, its ability to continue to engage in robust review might be impaired.¹³

But, Professor Driver argues, no such consensus exists, or ever has.¹⁴ Constitutional meanings are always contested. This has implications for the descriptive and normative claims associated with consensus constitutionalism. Descriptively, the Court cannot simply ratify a nonexistent consensus. The Court's relation to public views will always be more complex—always aligning itself with some of the American people but not all. Normatively, the risk of noncompliance or impairment of the Court's power might not come to pass or might be worth incurring, given that the Court will always have some allies in the wider society.

There is, I think, an alternative way of understanding the arguments of consensus constitutionalists, more compatible with a political-science approach to understanding the Supreme Court as one political institution among others—and so, more generous to consensus constitutionalists. This Response is not the place to develop a full account of the alternative, but I can sketch its outlines and the research program it suggests.

The alternative is that our constitutional politics takes two forms. By “constitutional politics,” I mean the development of policies that implicate—by supporting, rejecting, or impairing—what some in the society believe to

11. Driver, *supra* note 1, at 770–74.

12. See *id.* at 773 (quoting Friedman as stating that “the Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup poll” and Klarman as remarking that “[t]he justices reflect dominant public opinion too much for them to protect truly oppressed groups” (internal quotation marks omitted)).

13. See *id.* at 774 (“Justices who wish to avoid defiance of their rulings and to preserve the Court’s legitimacy steadfastly issue decisions consonant with public opinion.” (internal quotation marks omitted)); *id.* at 793 (addressing the proposition that Justices listen to public opinion “‘if they care about preserving the Court’s institutional power, about having their decisions enforced, about not being disciplined by politics’” (quoting BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 375 (2009))).

14. Professor Driver identifies a “flourishing” consensus among law professors in the last decade. Driver, *supra* note 1, at 767. However, among the American public, a consensus is “nonexistent on many constitutional questions,” although there may be a convergence between opinion and judicial outcomes because of the influence—rather than control, as consensus constitutionalists would have it—of the public. *Id.* at 777–83.

be values inscribed in the Constitution.¹⁵ One form of constitutional politics operates through the legislative and executive branches and the other through the judiciary. The claim made by consensus constitutionalists, taken in its best light, is that in general, the results—the constitutional policies actually pursued—will be the same whichever process is used.¹⁶ Or, more crudely, you do not get from the courts anything that you would not have gotten from legislatures.

Of course, supporting this “same results claim” empirically will be difficult. Here are some of the difficulties:

(1) Political actors make strategic decisions about which path to follow that are predicated in part on their judgments about which path is more likely to produce success.¹⁷ So we might not be able to compare the outcome of the judicial path to the outcome reached when political actors use the legislative–executive path to seek exactly the same policy.

(2) Sometimes political actors compete over which path to follow. That competition sometimes leads to both paths being pursued at the same time (though by different actors).¹⁸ Yet, observing outcomes from the two paths might not tell us about the paths as such, which is what we want to know in examining the “two paths, one result claim.” Suppose the results differ.¹⁹ The actor who pursued the legislative–executive path might simply have been better (or worse) in performing the tasks required in legislative

15. This formulation is designed to avoid taking a position on *what* values are so inscribed because the individuals who take such positions in ways relevant to political analysis are political actors, not scholars stipulating what the Constitution means. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 573 (2009) (noting that political majorities provide direction to the Supreme Court as to constitutional values). I suspect that the formulation omits some possible relations between policies and constitutional values, but I am confident that whatever omissions there are could be incorporated into the full picture that I am only sketching here.

16. *See* Driver, *supra* note 1, at 772 (“Even in the absence of judicial review, Sunstein contends that popular views shape modern constitutional understandings.” (citing CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 4 (2009))).

17. *See* JERRY W. GILLEY, THE MANAGER AS POLITICIAN 121 (2006) (noting that selection of a solution with the “opportunity for the highest degree of success” is the “principal responsibility” of a politician who is contemplating policy alternatives).

18. *See* Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 23–25 (2009) (chronicling efforts by President Johnson, Congress, and the federal judiciary to promote civil rights during the 1960s through the appointment of African-American jurists and the passage of civil rights legislation).

19. *See, e.g.*, FRIEDMAN, *supra* note 13, at 119 (remarking that slavery was not abolished by the judicial path but instead by the legislative–executive path through a constitutional amendment). I make this assumption for ease of exposition. A parallel argument can be made if the results from the two processes are the same, but laying it out is more difficult. *Cf.* Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) (indicating that by the time *Roe v. Wade*, 410 U.S. 113 (1973), was decided, many states had already expanded legal access to abortion and that the number and rate of abortions did not substantially increase after *Roe*).

and executive politics than the actor who pursued the judicial path was at performing the tasks required in that process.²⁰

(3) Sometimes slightly different policies will be pursued through the different processes, and, of course, the processes operate at different paces. So, inferring differences in the processes from different outcomes can be hazardous.²¹ Similarly, inferring anything when both paths yield similar results can be hazardous.²²

Still, consensus constitutionalists can make some rough empirical judgments by, for example, looking at the outcomes of the legislative–executive process with respect to some policy and the outcomes of the judicial one with respect to policies in roughly the same area of concern.²³ The comparison will not be perfect, but consensus constitutionalists could think it will shed some light on the two paths, one result claim.

But, of course, consensus constitutionalists understand that the two processes are different because legislatures and courts are different institutions. Legislatures respond to some specific types of efforts to get them to act—roughly, by asking how many constituents care about an issue pressed upon them by policy activists. They have some institution-specific veto points, like committees.²⁴ Courts respond to other types of efforts to get

20. The legislative–executive actor might be exceptionally good at mobilizing political pressure, for example, while the judicial actor might be merely ordinary or worse at developing a credible trial record to support the constitutional argument that he ends up making. Cf. Ogletree, *supra* note 18, at 17 (characterizing Chief Justice Warren as “a linchpin in the unanimous decision rendered by the Court in *Brown* [v. *Board of Education*, 347 U.S. 483 (1954)]”); *id.* at 18–19 (hypothesizing that desegregation and integration would have occurred more quickly had President Eisenhower followed the example set by President Truman, who integrated the armed forces).

21. See, e.g., Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10–11 (1994) (arguing that while racial desegregation likely would have occurred without *Brown*, the decision hastened “the enactment of landmark civil rights legislation”).

22. An additional complexity, which I ignore here, is associated with federalism. Political actors can pursue one path in one state and another path in others, even with respect to the same policies. See Richard Gregory Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724, 1726–27 (1979) (noting that while a number of state legislatures had expanded legal access to abortion before *Roe*, at least one restrictive abortion statute had been judicially invalidated, and a number of constitutional challenges had been raised by defendants in state abortion prosecutions).

23. For example, comparison of race discrimination in schools—attacked via the judicial process—and race discrimination in employment—attacked via the legislative–executive one—allows for such an analysis. See Ogletree, *supra* note 18, at 18 (“*Brown* clearly made the practice of racially segregated schooling throughout the nation unconstitutional.”); cf. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 638–39 (indicating that Congress attacked employment discrimination through legislative efforts “to respond to the Supreme Court’s recent decisions by restoring the civil rights protections that were dramatically limited by those decisions” (internal quotation marks omitted)).

24. See John E. Owens & Burdett A. Loomis, *Qualified Exceptionalism: The US Congress in Comparative Perspective*, 12 J. LEGIS. STUD. 258, 267–68 (2006) (remarking that “[t]he legislative process in the Congress includes more institutional veto points than any other” because of overlapping and dispersed committee responsibilities, a tedious legislative process, a decentralized character, and weak political parties that “make legislative bargaining and compromise essential”).

them to act—putting the machinery in motion whenever an individual files the appropriate papers (but perhaps taking those papers seriously only if the litigant offers some indication that there is more than a simple crank in front of them)—and to different kinds of veto points embodied in justiciability doctrines.²⁵ These and other differences mean that the same results claim has to be qualified.

Here are some, among many, qualifications:

(1) Time frames matter. Some policy changes can occur relatively rapidly, while others take more time to settle in. And the two processes operate at different paces. Further, the processes interact in complex ways.²⁶ A short-term victory in the courts might turn into a long-term loss.²⁷ A more interesting possibility for the consensus constitutionalist is that a short-term loss in the courts might turn into a long-term victory through the legislative process.²⁸ Or, more interesting to the critic of consensus constitutionalism, a short-term victory in the courts might provoke an immediate adverse response in the legislative process but a longer term success.²⁹ The same

25. I know that referring to justiciability doctrines as *veto points* is technically inaccurate. Cf. Mark Tushnet, *Constitutional Workarounds*, 87 TEXAS L. REV. 1499, 1503 & n.27 (2008) (indicating that attempts by a legislature to work around constitutional text obstructing its ability to reach a desired goal “would undoubtedly face serious justiciability objections”). But, I think it is metaphorically accurate.

26. Consider here that the results emanating from the judicial policy-making process might stimulate responses from the legislative–executive one, not merely with respect to specific policies but also to the courts’ composition. See, e.g., William E. Leuchtenburg, *The Origins of Franklin Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 347–48 (characterizing President Roosevelt’s court-packing plan “either as an impulsive act born of the hubris created by FDR’s landslide victory in 1936 or as a calculated plot hatched many months before in angry resentment at the [A.L.A.] Schechter [Poultry Corp. v. United States, 295 U.S. 495 (1935),] verdict” (emphasis omitted)).

27. The conventional example here, though a complex one, is *Roe v. Wade*. The pro-choice victory is said to have sparked a pro-life response that produced dramatic gains for a conservative Republican Party that implemented policies said to be adverse overall to the interests of women, though it has been unable to undo *Roe* itself. See Sunstein, *supra* note 19, at 766 (“[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women’s movement by spurring opposition and demobilizing potential adherents.”). The long-term defeat, that is, was not that women seeking abortions in the early twenty-first century found it more difficult to obtain them than women seeking abortions in 1970 did, but rather that the overall situation of women in the early twenty-first century was worse than it would have been had *Roe* not generated support for a conservative Republican Party. See *id.* (“By 1973, . . . state legislatures were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe*. However surprising the point may be, *Roe* did not dramatically increase the actual number or rate of abortions.”).

28. Here the conventional example is *Bowers v. Hardwick*, 478 U.S. 186 (1986), and the ensuing backlash in support of gay rights. See Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 443–44 (2005) (noting the decline in public opposition to homosexuality from 55% to 33% in the seventeen years after *Bowers*, and citing court decisions in Hawaii and Vermont in favor of same-sex couples).

29. This is the still-open possibility associated with gay-marriage litigation. For an interesting analysis of the backlash argument in this context and its limitations, see Thomas M. Keck, *Beyond*

results claim does not require that we ignore these possibilities. Rather, it directs us to think about the circumstances under which they might be realized.

(2) An important variant on the time frame question is this: Sometimes a policy is adopted through the judicial path, but it has relatively little effect in the short run—and in the long run too, if policy making along the legislative–executive path does not come to the same result over time.³⁰ But, if policy making along the legislative–executive path does come to the result earlier reached on the judicial path, are we observing the two paths, one result phenomenon? Only if the earlier judicial decision has little or no causal effect on the outcome reached along the legislative–executive path. And determining whether there is such a causal effect is extremely difficult.³¹

(3) As I have suggested, we might want to examine the strategic choices that political actors make. One obvious possibility is that political actors may calculate that their chances of success in the legislative–executive process are low (say, because of a veto point like the filibuster in the Senate), while their chances of success through the judicial process, though slim, are not quite as low. And they might calculate that the time frame questions I have mentioned might make it possible for a judicial victory to “stick.”³²

Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights, 43 LAW & SOC’Y REV. 151, 152–55 (2009).

30. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW, xii–xiii (2010) (“[This book] describe[s] several instances where Supreme Court decisions were ignored or disobeyed, where the president’s or the public’s acceptance of Court decisions was seriously in doubt. These examples of the Court’s infirmity . . . demonstrate that public acceptance is not automatic and cannot be taken for granted.”).

31. The important example here is the experience with elementary and secondary school desegregation after *Brown v. Board of Education*. It is indisputable that *Brown* had relatively small effects in the deep South until Congress and the President came around in the early 1960s and, especially, until southern school systems faced the threat of losing federal financial aid after 1965. See Klarman, *supra* note 21, at 9–10 (explaining that “*Brown* was directly responsible for only the most token forms of southern public school desegregation,” which arose “[o]nly after the 1964 Civil Rights Act threatened to cut off federal educational funding for segregated school districts and the Department of Health, Education, and Welfare in 1966 adopted stringent enforcement guidelines”). Klarman contends that the decisions made by Congress and the President in the early 1960s were not causally affected by *Brown*, though they were so affected by the civil rights movement (but that movement was not, in his view, causally affected by *Brown*). See *id.* at 11 (arguing that *Brown* contributed to the civil rights movement by instigating southern white resistance to integration, such as the “brutal suppression of civil rights demonstrations,” which made it politically expedient for Presidents Kennedy and Johnson to advance civil rights legislation). Most historians of the civil rights movement, I think, disagree with the argument that *Brown* was not causally effective on the legislative–executive policies adopted in the 1960s. See *id.* at 75 (“According to deeply entrenched conventional wisdom, *Brown* was directly responsible for the 1960s civil rights movement, which in turn inspired the transformative civil rights legislation of the mid-1960s.”).

32. Obviously, the model I am working from here is the NAACP’s choice to pursue litigation against elementary and secondary school segregation. See Orley Ashenfelter et al., *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AM. L. & ECON. REV. 213, 219–22 (2006) (chronicling how the NAACP launched a direct challenge to unequal funding and racial separation in elementary and secondary

Slim chances are better than none from a political actor's point of view. In a related inquiry, we might want to disaggregate the category of political actors to see whether actors who choose to pursue the judicial policy-making route are different in systematic and interesting ways from those who choose to pursue the legislative-executive one.³³

(4) Again, as I have suggested, contested constitutionalism means that judicial decisions will have some support no matter what the result. Assume that the result from the courts differs, to some degree, from that which would have resulted from the legislative process. We might ask: Under what conditions will the judicial decision stick? We might look into the ways in which political actors use the results from the judicial process in their actions in the legislative-executive one—as targets in the backlash scenario, of course, but also as normative validation that can play a political role.³⁴

(5) Finally, to give systematic form to a point Professor Driver makes, the Supreme Court is a small-numbers institution compared to Congress and state legislatures.³⁵ The statistics of sheer numbers means that there will necessarily be greater variance in outcomes from the judicial policy-making process than from the legislative-executive one, which implies that we will always observe some degree of difference between the outcomes of the two processes. Sometimes the greater variance associated with the Supreme Court will be quite consequential.³⁶

The two paths, one result claim associated with consensus constitutionalism is clearly overstated. Institutions differ, and institutions matter. But consensus constitutionalists, at least in their best moments, know that. Consensus historians did too.

schools). The possibility of legislative success in Congress was blocked by the filibuster veto-point. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1281–82.

33. The obvious hypothesis is that lawyers will be found in leadership roles in larger numbers in groups that use the judicial route than in those that use the legislative-executive one.

34. Here, the basic text is Martin Luther King's speech at the Holt Street Baptist Church in connection with the Montgomery bus boycott: "If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer that never came down to earth. If we are wrong, justice is a lie." Martin Luther King, Jr., Address to MIA Mass Meeting at Holt Street Baptist Church (Dec. 5, 1955).

35. See Driver, *supra* note 1, at 786 ("[L]egal scholars should not attempt to understand outcomes in Supreme Court cases primarily by examining the attitudes of 300 million Americans toward constitutional questions when they can get a better read by paying attention to the attitudes of just nine.").

36. This is a systematic way of putting the widely-noted point that chance—the timing of a death or a retirement, or the selection of one rather than another nominee—plays a big part in generating Supreme Court outcomes. See Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231, 238 (2007) (noting that the "overwhelming consensus of observers of the Supreme Court" is that appointments to the Court have long-term consequences for public policy).

III. Why Normative Discourse Remains Possible

Professor Driver is concerned that consensus constitutionalism is a counsel of despair.³⁷ Why bother to use the courts if the outcomes are predetermined by the existing consensus among the American people on what the Constitution means? Contested constitutionalism offers some solace.

I am not particularly interested in specifics about normativity in constitutional theorizing; I tend to think that it is self-indulgent (who, other than the author's friends and family, really cares what a law professor thinks is the right constitutional thing to do?). But, the idea of contested constitutionalism does show why normativity remains possible—not merely because disagreement makes successful normative argument possible.

The starting point is the observation that interpreting recent history is quite difficult and interpreting contemporary events even more so. We barely have a handle on the significance and meaning of the Reagan presidency for the American political order, for example: Did it redefine the entire structure of American politics, shifting every institution rightward on almost every issue, or did it take as a given the basic structure of the New Deal and the Great Society but put the brakes on further movement to the left? What was the constitutional consensus in the 1980s and 1990s that consensus constitutionalists ask us to find?

More important for normative discourse, what is the constitutional consensus today—on affirmative action, gay rights, and health care? I have no doubt that consensus constitutionalists could, and perhaps have, come up with assertions about the consensus in the 1980s and 1990s and perhaps even about what today's consensus is. They could rely on surveys of public opinion and such. But everyone who studies public opinion surveys knows how tricky they are to interpret—and, though here I go beyond my expertise, I suspect that interpreting public opinion surveys on constitutionally-inflected policies is especially tricky.³⁸

37. See Driver, *supra* note 1, at 783 (“Given that the consensus-based approach to legal history is predicated on understanding Justices to march along with society at large, it is not surprising that they also view judicial decisions as seemingly inevitable. Consensus constitutionalists come dangerously close to viewing Supreme Court decisions as being somehow foreordained by the zeitgeist.”).

38. Do public opinion surveys that ask, “Do you approve of racial intermarriage?”, tell us much about the following question, “How many people approve of laws prohibiting racial intermarriage?”? See Ed Blair et al., *How to Ask Questions About Drinking and Sex: Response Effects in Measuring Consumer Behavior*, 14 J. MARKETING RES. 316, 316 (1977) (concluding from a study in which respondents were interviewed about “behaviors and conditions that are . . . generally not discussed in public without tension” that: “closed-ended questions elicit negative response effects (underreporting)”; “closed-ended questions also seem more sensitive to social desirability factors, and result in depressed reporting about socially sensitive behavior or attitudes”; and “response effects . . . decrease with increasing question length”).

With respect to prior decades, the pervasive practice of historical revisionism ought to offer some caution about accepting such characterizations too readily. Revisionist scholarship regularly destabilizes accepted understandings of the past and, even more so, I think, of the recent past.³⁹ Over time, I suppose, the differences between revisionists and their predecessors and successors narrow, although I doubt that they are ever eliminated.

The bite of this observation comes when we reach the present. I am not sure why anyone interested in normative issues in contemporary constitutional law should care whether *Dred Scott v. Sandford*⁴⁰ or *Plessy v. Ferguson*⁴¹ was wrong the day it was decided, so I am not bothered by a consensus constitutionalist's assertion that those decisions reflected the then-consensus of the American people.⁴² The assertion may be wrong or right, but it has no contemporary normative punch except insofar as it is used to support the two paths, one result claim. But obviously we should care when someone asserts that some constitutional position (that we like, presumably) is inconsistent with the existing consensus, when that assertion is used to support a political recommendation that political actors pursue one rather than the other path.⁴³

But, revisionism should tell us that claims about today's consensus are no more than claims—interpretations of contemporary politics and culture that might be right but might be wrong. Even more, if conflicts over constitutional meaning are ever-present, though shifting from one subject to another over time, that some are pressing and others resisting some specific constitutional claim strongly indicates that we are not yet in a situation of constitutional consensus. Maybe one side seems to have the upper hand for the moment, but things could change, slowly or rapidly.

Using historical experience to draw normative conclusions about what should be done in such circumstances is quite hazardous. I must emphasize

39. See, e.g., Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 174 (1994) ("Professor Klarman's account [of *Brown*] has the peculiar and no doubt unintended effect of substantially reducing the apparent role of African Americans in [the transformative racial] change, coming close to eliminating African Americans as historical agents, as acting subjects in the historical process rather than its objects.").

40. 60 U.S. (19 How.) 393 (1857).

41. 163 U.S. 537 (1896).

42. For example, Klarman views *Plessy* as a "product of its times," not "a product of racist judging." Driver, *supra* note 1, at 788 (quoting Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 26 (1996)). *Dred Scott* has also been viewed as a product of an inability to accept racial equality in the mid-nineteenth century. See, e.g., MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 3–4 (2006) (recognizing that *Dred Scott* resulted from a political environment in which slavery could only be abolished through civil war, political fiat, or electoral change).

43. I take it that the point is not to say "wait another decade or so to seek your goal," but rather to say that pursuit of the legislative–executive path is more likely to bring about the changes in public opinion that are necessary as a predicate for victory on either path.

that these are the circumstances of essentially all constitutional controversies when they occur.⁴⁴ Maybe a backlash will occur and bad things will get entrenched; maybe a backlash will occur in the short run, but the public will recoil at the backlash and provide support for a claim that it initially disfavored; maybe the decision will be greeted with indifference, even by people who were passionately on one or the other side a few or many years before, when the legislation now upheld or struck down was enacted; or maybe people will end up thinking that the Court got the right answer. I am sure there are other possibilities.

As far as I can tell, no sensible political actor would make serious decisions about how to proceed based on the claims of consensus constitutionalism. And, as far as I can tell, no serious political actor does. Of course such actors think about the things to which consensus constitutionalism directs their attention, because those things are relevant to the making of sensible political choices. But they also think about other things—how cultural change occurs outside of legislatures, for example.⁴⁵

Put another way, the circumstances of today's decision making, whenever "today" occurs, are so different from historical circumstances that consensus constitutionalism, even if descriptively accurate, cannot offer interesting normative guidance. When a consensus constitutionalist offers some observations about backlash and the like, he or she is acting as an interpreter of contemporary politics and culture as a participant in a contemporary dialogue about political choices open to political actors, not as a historian or constitutional theorist. Maybe the consensus constitutionalist happens to be a really good analyst of contemporary politics and culture, but maybe not. Maybe his or her observations about strategy ought to be taken seriously. But maybe not.

IV. Conclusion

In an appropriately qualified form, there is undoubtedly something to consensus constitutionalism. Over some ill-defined medium-to-long run, the odds are slim that a public policy initially developed by the courts will be sustainable unless it obtains (or possesses from the outset) support from

44. Cf. Petition for a Writ of Certiorari Before Judgment at 14, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 10-1014 (Feb. 8, 2011) (arguing that because of the constitutional controversy and political upheaval surrounding the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), "the States, citizens[,] and the economy remain mired in uncertainty"). These circumstances seem unsettled compared to how things seem in retrospect, when the controversies have been resolved, if only due to death and other sources of irrelevance.

45. Cf. Ogletree, *supra* note 18, at 25 (noting President Johnson's ambition to "transform America's attitudes toward African Americans" through the Great Society, although this led to political losses in the South).

political leaders in the legislative and executive branches.⁴⁶ Nothing in that formulation requires the analyst to assume that there is a consensus among the American people about anything. To that extent, references to consensus are misleading. And consensus constitutionalists should be criticized when they make such references without appropriate qualification. In this they resemble Hofstadter, in both his early and his later statements about what he was after when referring to consensus in American history.⁴⁷

From a normative point of view, the most important qualification embedded in the modest formulations of the two paths, one result claim that I have defended is that sometimes judicial decisions have a causally important effect on legislative and executive action. It is that possibility that makes consensus constitutionalism deeply misleading as a normative guide.

So Professor Driver is wrong and right: wrong in developing criticisms of consensus constitutionalism that rest on readings of the relevant scholarship that are less generous than they might be, but right in criticizing overstated claims about consensus on constitutional matters and in arguing that consensus constitutionalism, whether in an excessively strong or in an appropriately qualified form, does not deprive those who want to do so of the opportunity to press their normative positions in the courts.

46. The parenthetical qualification tries to account for situations in which political leaders in those branches want to pursue the policy that the courts initiate and, indeed, would have initiated it on their own but for the presence of opponents at strategic veto-points.

47. Hofstadter later said that his introduction to *The American Political Tradition* “was not written in order to establish some single overarching theory about American politics or American political leadership.” RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* xxi (Alfred A. Knopf ed., 1985) (1948). Nonetheless, he later accepted that this effort to avoid an overarching theory was for naught. *Id.* at xxii.